BRENNAN CENTER FOR JUSTICE
AT NYU SCHOOL OF LAW

December 20, 2002

Mattie C. Condray, Senior Assistant General Counsel
Office of Legal Affairs
Legal Services Corporation
750 First Street, N.E.
Washington, D.C. 20002-4250

VIA REGULAR MAIL

Re: Rulemaking Notice: 45 C.F.R. Part 1602

Dear Ms. Condray:

I write to submit the enclosed comments on the Legal Services Corporation's Notice of Proposed Rulemaking regarding 45 C.F.R. Part 1602. I hope the Corporation finds these comments useful as it promulgates the final version of the revised regulation. Please do not hesitate to contact me if you have any questions regarding the comments.

Have a lovely holiday season.

Very truly yours,

Laura K. Abel
Associate Counsel

Enclosure

COMMENTS

to the

LEGAL SERVICES CORPORATION

regarding

RULEMAKING NOTICE: 45 C.F.R. PART 1602, PROCEDURES FOR DISCLOSURE OF INFORMATION UNDER THE FREEDOM OF INFORMATION ACT

submitted by

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In response to the Notice of Proposed Rulemaking put out by the Legal Services Corporation ("LSC") regarding 45 C.F.R. Part 1602 (Procedures for Disclosure of Information Under the Freedom of Information Act ("FOIA")), the Brennan Center for Justice at New York University School of Law submits the following comments.

The Brennan Center is a non-profit law office working to develop and implement an innovative, nonpartisan agenda of scholarship, public education, and legal action that promotes equality and human dignity, while safeguarding fundamental freedoms. The Brennan Center's Poverty Program runs a Legal Services Project, a national, multifaceted effort dedicated to helping ensure that low-income people have access to effective, enduring, and unrestricted legal assistance in civil cases. The Brennan Center actively fights actions that interfere with legal services advocacy and vocally rebuts the relentless attacks made by opponents of legal services.

The Brennan Center submits these comments in order to ensure that LSC's regulations further the important goals of ensuring that: 1) the interested public is able to learn about LSC's operations, 2) members of the legal services community (including legal services clients) who seek to educate the public about LSC's operations and about the value of legal services are able to obtain the necessary information from LSC, 3) members of the legal services community (including legal services clients) are able to obtain fee waivers when they request documents from LSC under FOIA, and 4) LSC is able to protect confidential or privileged information regarding legal services programs receiving LSC funding and their clients or employees.

I. Proposed Amendment to 45 C.F.R. § 1602.13(e): New Fee Schedule

LSC proposes to amend 45 C.F.R. § 1602.13(e) to raise the fees charged for production or disclosure of LSC's records. The Brennan Center urges LSC to apply the new fee schedule only to FOIA requests filed after the effective date of the amendment, to ensure that requesters have adequate notice of the fee schedule applicable to them.

II. Proposed Amendment to 45 C.F.R. § 1602.13(f)(1)(ii): Denial of Fee Waivers for Information in the Public Domain

LSC proposes to amend 45 C.F.R. § 1602.13(f)(1)(ii) to provide LSC with the authority to deny a fee waiver if the information "is already in the public domain, in either a duplicative or a substantially identical form." The Brennan Center urges LSC to define the terms "public domain" and "a substantially identical form" as set forth in sections II.A and II.B below in order to effectuate the goals of the Freedom of Information Reform Act of 1986 that FOIA "'is to be liberally construed in favor of waivers for noncommercial requesters,'" and to "'remove the roadblocks and technicalities which have been used by various Federal agencies to deny waivers or reductions of fees under the FOIA.'" *See McClellan Ecological Seepage Situation*, 835 F.2d 1282, 1283 (9th Cir. 1987) (quoting 132 Cong. Rec. S14298 (Sept. 30, 1986) (Sen. Leahy) & 132 Cong. Rec. S16496 (Oct. 15, 1986) (Sen. Leahy)); *see also Pederson v. Resolution Trust Corp.*, 847 F. Supp. 851, 855 (D. Colo. 1994).

A. LSC should define "public domain" to mean information that is "readily available" to the public.

"Public domain" should be defined to mean information that has met a threshold level of public dissemination, *Campbell v. United States Dep't of Justice*, 164 F.3d 20, 36 (D.C. Cir. 1999) ("the mere fact that material is in the public domain does not justify denying a fee waiver; only material that has met a threshold level of public dissemination will not further 'public understanding' within the meaning of the fee waiver provisions"), meaning that the information is "readily available" to the public. *See Carney v. United States Dep't of Justice*, 19 F.3d 807, 815-16 (2d Cir.1994) (materials were not in the public domain where they had merely been released to other FOIA requesters, and where agency did not "explain[ ] how these records were readily available to the public"). For information to be in the public domain, it is not enough that the information already is in the hands of one or more private individuals or organizations, if those organizations have not made them readily available to the public. *See Carney*, 19 F.3d at 815-16; *Schrecker v. Department of Justice*, 970 F. Supp. 49, 50-51 (D.D.C. 1997). Nor is it enough for the information to be available in LSC's reading room, particularly if the requester is not located in Washington, D.C. or if the information is voluminous. *See Friends of the Coast Fork v. United States Dep't of the Interior*, 110 F.3d 53, 55 (9th Cir. 1997); *Fitzgibbon v. Agency for Int'l Dev.*, 724 F. Supp. 1048, 1051 (D.D.C.1989).

B. LSC should define "substantially identical form" as excluding compilations or summaries of information that is in the public domain.

"[A] substantially identical form" should be defined as excluding LSC's compilations or summaries of information that is in the public domain. When information is in the public domain in various different places, but LSC's compilations or summaries of that information are not, LSC's summaries and compilations may contribute significantly to the public understanding in satisfaction of 45 C.F.R. § 1602.13(f)(1)(ii). *See Campbell*, 164 F.3d at 36 (FBI summaries of newspaper articles in the public domain were new material, and thus might contribute significantly to public understanding); *Fitzgibbon*, 724 F. Supp. at 1051 ("'Plainly there is a vast difference between the public records that might be found after a diligent search of courthouse files . . . and a computerized summary located in a single clearinghouse of information.'") (quoting *United States Dep't of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 764 (1989)).

III. Proposed Amendment to 45 C.F.R. § 1602.13(f)(1)(iii): In That Section, and Throughout 45 C.F.R. § 1602.13(f)(1), LSC Should Define "Public" as Including One or More Segments of the Public at Large.

LSC proposes to amend 45 C.F.R. § 1602.13(f)(1)(iii) to provide LSC with the authority to deny a fee waiver if the information requested will not be made available to "a reasonably broad audience of persons interested in the subject." In accordance with LSC's obligation to liberally construe the fee waiver provisions in favor of waivers for noncommercial requesters, *see* discussion *supra* p. 1, the Brennan Center urges LSC to define "reasonably broad" as including one or more segments of the public at large. *See Van Fripp v. Parks*, No. 97-159,

2000 U.S. Dist. LEXIS 20158, at *12 (D.D.C. Mar. 16, 2000) (finding disclosures intended to contribute to understanding of segment of public consisting of prisoners adequate to satisfy the "public understanding" requirement). *See also Carney v. Department of Justice*, 19 F.3d 807, 814-15 (2d Cir. 1994) (book aimed at "interested scholars" would benefit public); *Linn v. United States Dep't of Justice*, No. 92-1406, 1995 WL 631847, at *14 (D.D.C. Aug. 22, 1995) ("[N]othing in the [FOIA] statute supports a distinction between public 'at large' and a 'segment' of the public."). To satisfy "reasonably broad," the requested information need not be made available to the general public. In fact, Congress specifically amended FOIA in 1986 to remove language in the fee waiver provision requiring that disclosure benefit the "general public," replacing it with the current language that requires only that disclosure "contribute significantly to public understanding." *See Linn*, 1995 WL 631847, at *14 n.4 (comparing 5 U.S.C. § 552(a)(4)(A) (1977) with 5 U.S.C. § 552 (a)(4)(a)(iii) (1994 Supp.)).

Likewise, the term "public" as used in 45 C.F.R. §§ 1602.13(f)(1), 1602.13(f)(1)(ii), and 1602.13(f)(1)(iv), should also be understood to be satisfied by one or more segments of the public at large.

IV. Proposed Amendment to 45 C.F.R. § 1602.13(f)(1)(iv): LSC Should Provide Examples of Requests That Would Satisfy This Criterion

LSC proposes to amend 45 C.F.R. § 1602.13(f)(1)(iii) to provide LSC with the authority to deny a fee waiver unless "the public's understanding of the subject matter in question, as compared to the level of public understanding existing prior to the disclosure, [is] enhanced by the disclosure to a significant extent." The Brennan Center urges LSC to consider deleting this language. The language is confusing and does not clarify what is meant by "[t]he significance of the contribution to public understanding."

However, if LSC does include this language in the final regulation, the Brennan Center urges LSC to include in the preamble examples of FOIA requests that have been or would be found to satisfy this criterion. Inclusion of examples would help explain what is meant by this criterion. Following are a few examples LSC could include:

A. In *Oregon Natural Desert Assn. v. United States Dep't of the Interior*, a federal district court in Oregon held that public understanding would be enhanced significantly where the requested information would be used to prosecute an appeal of an agency action, and the requester would also disseminate the information through its newsletter and to public interest groups and agencies in Oregon. 24 F. Supp. 2d 1088, 1089, 1095-96 (D. Or. 1998).

B. In *Carney v. Department of Justice*, the D.C. Circuit held that public understanding would be enhanced significantly where the requested information would be used to write a planned book aimed at a scholarly audience. 19 F.3d at 814-15.

C. In *Schrecker v. Department of Justice*, a federal district court in the District of Columbia held that public understanding would be enhanced significantly where the requested information would be used "to write a book for the general public about the government's internal security program during the 1940s and 1950s, the so- called McCarthy period." 970 F. Supp. 49, 50 (D.D.C. 1997) ("'The courts have consistently overturned agency denials of fee waivers when requestors have made a legitimate, objectively supportable showing of using the requested information for scholarly research into political and historical events.'") (quoting *Ettlinger v. FBI*, 596 F. Supp. 867, 875-76 (D.Mass.1984)).

V. Proposed Amendment to 45 C.F.R. § 1602.13(j): LSC Should Define "Properly Assessed" to Exclude Fees That Are the Subject of Pending Appeals or Lawsuits.

LSC proposes to amend 45 C.F.R. § 1602.13(j) to provide LSC with the authority to stop processing requests (including appeals) from requesters who have not paid overdue fees. LSC considers fees to be overdue if they are more than 30 days late. The preamble to the Notice of Proposed Rulemaking says that overdue fees will only be an issue if they are "properly assessed," and paragraph (j) of the proposed regulation says that they will only be an issue if they are "properly charged." But in neither place, nor in the definitions section of the regulation, does LSC define "properly assessed" or "properly charged."

The Brennan Center suggests that LSC use the same term (either "properly assessed" or "properly charged") in both places, and that LSC define the term as excluding fees that are the subject of a pending appeal or a pending lawsuit. Requesters who have sought a fee waiver and been denied, but who have timely filed an appeal regarding that denial, should not have to pay those fees unless and until the appeal has been denied and any timely filed lawsuits regarding the denial of the appeal have been finally decided. *See Schwarz v. United States Dep't of Treasury*, 131 F. Supp. 2d 142, 148 (D.D.C. 2000) (federal district courts have subject matter jurisdiction over FOIA cases when the requester has either made "payment of required fees or [filed] an appeal within the agency from a decision refusing to waive fees"), *aff'd*, 2001 WL 674636 (D.C. Cir. May 10, 2001); *Trueblood v. United States Dep't of Treasury*, 943 F. Supp. 64, 68 (D.D.C. 1996) (same); *Kuchta v. Harris*, 1993 WL 87705, *3 (D. Md. Mar. 25, 1993) (same). Requiring the requesters to pay fees that are the subject of an appeal before LSC will process other FOIA requests would, in effect, compel requesters to pay fees while a their appeals are still pending, thus depriving requesters of their right to judicial review under 5 U.S.C. § 552(a)(4)(vii).

VI. Proposed Addition of 45 C.F.R. § 1602.14

The Brennan Center commends LSC for following the procedures outlined in Federal Executive Order No. 12,600, and for proposing to incorporate into its regulations LSC's current practice under that Executive Order. Specifically, LSC states in the NPRM that "if a request is received for the grant application records of a current or prospective recipient, LSC provides that applicant with an opportunity to request that some or all of the records requested be withheld from disclosure prior to LSC sending its response to the requester." LSC states that this process

is based on Federal Executive Order 12,600, requiring federal agencies to "establish procedures to notify submitters of records containing confidential commercial information [information arguably subject to FOIA Exemption 4] . . . when those records are requested under the Freedom of Information act . . . ."

A. LSC should add information from client files and information about donors to legal services offices as information that may fall under exemption 4.

LSC "specifically invites comment on whether there are other records [apart from grant applications] submitted by recipients which would likely be subject to withholding under Exemption 4 [the trade secrets exemption]." *See* Notice of Proposed Rulemaking. It is unclear from LSC's NPRM whether it seeks comment regarding all categories of records protected by Exemption 4, or only regarding categories of records protected by Exemption 4 because disclosure would cause competitive harm to the submitter. The Brennan Center suggests that in the event LSC were to obtain information from client files, some of that information (particularly information regarding clients' businesses, but possibly also clients' personal financial information as well) may fall under Exemption 4 because disclosure would cause competitive harm to the submitter, and the information may fall under Exemption 4 for other reasons as well. *See Washington Post Co. v. United States Dep't of Health & Human Servs.*, 690 F.2d 252, 266 (D.C. Cir. 1982) (personal financial information may be protected by exemption 4).

B. LSC should extend to information arguably protected by *any* of the FOIA exemptions its practice of providing recipients with an opportunity to request that records requested by withheld.

Additionally, the Brennan Center suggests that LSC extend to information arguably protected by *any* of the FOIA exemptions its practice of providing recipients with an opportunity to request that some or all of the records requested be withheld from disclosure. Although such extension is not required by Executive Order No. 12,600, it is nonetheless warranted because, pursuant to LSC's auditing and compliance functions, LSC gathers a considerable amount of information arguably protected by FOIA exemption 6, which protects "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy," *see* 5 U.S.C. § 552(b)(6); 45 C.F.R. § 1602.9(a)(5), and by FOIA exemption 7, which protects "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy." *See* 5 U.S.C. § 552(b)(7); 45 C.F.R. § 1602.9(a)(6). Information covered by these exemptions may include information from recipients' client files, the Statements of Facts that recipients must obtain from clients pursuant to 45 C.F.R. § 1636.2(a)(2) (requiring a recipient to "[p]repare a dated written statement signed by each plaintiff it represents, enumerating the particular facts supporting the complaint insofar as they are known to the plaintiff"), and the name and full address of each party to a case that recipients must disclose pursuant to 45 C.F.R. Part 1644. Covered information may also include information from recipients' personnel files.

In fact, in 45 C.F.R. § 1619.4, LSC specifically states that LSC grantees need not disclose to the public "(a) Any information furnished to a recipient by a client; . . . (c) Any material used by a recipient in providing representation to clients; . . . or (e) Personnel, medical, or similar files." If grantees need not disclose such information, LSC should take all steps necessary to protect that information too.

Extending to information arguably protected by *any* of the FOIA exemptions the practice of providing recipients with an opportunity to request that records be withheld from disclosure makes practical sense, because recipients, as the lawyers who have had personal contact with their clients and with their employees, are in a better position than LSC to evaluate the extent to which information about their clients and employees implicates a privacy interest. For example, recipients are in a better position than LSC to know whether "there is a substantial probability that disclosure will cause an interference with personal privacy," *see National Ass'n of Retired Federal Employees v. Horner*, 879 F.2d 873, 878 (D.C. Cir. 1989) (setting out the standard), and whether there is an expectation of privacy. *See Alliance for the Wild Rockies v. Dep't of the Interior*, 53 F. Supp. 2d 32, 37 (D.D.C. 1999). Contacting the recipients before providing the requested information will, consequently, allow LSC to make a more informed decision regarding whether the information is properly the subject of a FOIA exemption. *See, e.g., War Babes v. Wilson*, 770 F. Supp. 1, 4-5 (D.D.C. 1990) (requiring agency to contact former servicemen whose addresses were the subject of a FOIA request, to ascertain whether they had a privacy interest protected by exemption 6).

Moreover, a recipient will be more likely to turn information over to LSC if that recipient knows that in the event the information is the subject of a FOIA request the recipient will be contacted and provided with an opportunity to request withholding of the information. Thus, providing recipients with notice and an opportunity to request withholding would enhance the ability of LSC to obtain information necessary to its ability to monitor recipients' compliance with the LSC Act, the LSC appropriations acts, and other relevant law.